

***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-2057
B
dy

VOLUME ONE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X

DAVID HOLLIS, :

Petitioner-Appellant, :

- against - :

HAROLD J. SMITH, Superintendent, Attica :
Correctional Facility, :

Respondent :

-----X

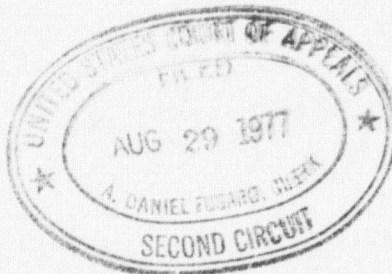
On Appeal from the United States District
Court for the Eastern District of New York

APPENDIX FOR PETITIONER-APPELLANT

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HOWARD B. COMET



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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - -X

DAVID HOLLIS,

Petitioner,

-against-

HAROLD J. SMITH, Superintendent,
Attica Correctional Facility,

Respondent.

76 C 1083

OPINION AND
ORDER

February 9 , 1977

- - - - -X

PLATT, D.J.

By a petition for a writ of habeas corpus, David Hollis challenges an allegedly illegal sentence imposed upon him by the Nassau County Court in violation of the United States Constitution. Title 28 U.S.C. § 2241 et seq.

On September 23, 1965, the petitioner entered a plea of guilty to a charge of assault in the second degree with intent to commit rape. New York's former Penal Law of 1909 § 242 provided alternative penalties for this offense of imprisonment for a term not exceeding five years, (or a fine, or both), or imprisonment for an indeterminate term of one day to life. Petitioner was sentenced on December 8, 1965, pursuant to the latter provision which could be imposed only for the commission of certain enumerated sex offenses.^{1/}

^{1/} This provision for indeterminate sentences of sex offenders was subsequently omitted from the New York Penal Law of 1967.

Section 2189-a of the former New York Penal Law prescribed the procedure for such sentencing which required a psychiatric examination of the convicted offender and the preparation and submission of a written report to the Court.

However, in 1967 the Supreme Court held that before a convicted defendant could be sentenced to an indeterminate term under Colorado's Sex Offender Act, he must be afforded a judicial hearing with certain enumerated due process protections. Specht v. Patterson, 386 U.S. 605 (1967). The New York Court of Appeals subsequently held Specht applicable to New York's Sex Offender Statute, § 242 of the former New York Penal Law, thus requiring that defendants sentenced under the New York Statute be afforded a hearing in accordance with Specht. People v. Bailey, 21 N.Y.2d 588, 237 N.E.2d 205, 289 N.Y.S.2d 943 (1968). As a result, petitioner's sentence was vacated and a hearing was conducted on January 21, and 28, 1969. At the hearing, two psychiatrists testified that the petitioner should be confined to prison. Accordingly, the petitioner was resentenced on February 25, 1969 to an indeterminate term of one day to life.^{2/} The sentence was affirmed by the Appellate Division, Second Department, and leave to appeal to the New York Court of Appeals was denied on May 15, 1970.

^{2/} Petitioner was later paroled from this sentence, but a subsequent arrest and plea of guilty to another crime resulted in revocation of his parole and his return to prison under the indeterminate sentence.

Petitioner claims herein that the procedure followed in his resentencing denied him due process. Specifically, he argues that he should have been afforded the rights to a jury trial and to the harsher burden of proof "beyond a reasonable doubt" rather than by "a preponderance of the evidence" resting on the state, and the rights to remain silent and to the assistance of counsel during examination by the psychiatrists who testified at his resentencing hearing.^{3/}

Petitioner's claims rest on the Supreme Court's decision in Specht v. Patterson, supra. The issue before the Court in Specht was whether the rule of Williams v. New York, 337 U.S. 241 (1949) that due process does not require a hearing during the judge's determination of sentence after conviction applies to indeterminate sentences under Colorado's Sex Offender Act. The Colorado Statute, like New York's former Statute, provided only for a psychiatric examination of a convicted defendant who was suspected of constituting a threat to the public or of being a habitual offender and mentally ill, and for submission of a written report to the Court. The Supreme Court said, at p. 608, that:

"[t]hese commitment proceedings whether denominated civil or criminal are subject both to the Equal Protection Clause of the Fourteenth Amendment . . . and to the Due Process Clause."

^{3/} Petitioner originally raised additional claims relating to the conditions of his confinement. However, these claims were withdrawn by stipulation of the parties.

The Court's rationale was that the commission of the original crime was not the basis for sentencing, but merely acted as a catalyst for a new proceeding to determine whether the convicted defendant came within the statutory definition of sex offender. Since this finding resulted in the possibility of prolonged criminal punishment, certain due process safeguards were held mandatory. The Court enumerated these safeguards at p. 610:

"Due process, in other words, requires that he be present with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross examine, and to offer evidence of his own. And there must be findings adequate to make meaningful any appeal that is allowed."

In holding that New York's former sex offender statute came within the ambit of Specht as also involving "an additional finding of fact independent of the question of guilt", People v. Bailey, supra, at 596, the New York Court of Appeals noted at p. 594 the nature of the findings required of the judge before he could impose an indeterminate sentence under the statute: "that the defendant is a danger to society or is capable of being benefited by the confinement envisaged under the statutory scheme".

Subsequent to these decisions, the Supreme Court decided two cases which the petitioner contends require an extension of Specht. In Duncan v. Louisiana, 391 U.S. 145 (1968), the Court held that the right to a jury trial was applicable to state criminal trials. In addition, the Court held in the case of In Re Winship, 397 U.S. 358 (1970) that

the right to have all of the elements of a crime proven beyond a reasonable doubt was applicable to the states. Thus, petitioner argues that he should have been afforded these additional due process rights at the time of the hearing.

I

Except as hereinafter indicated, petitioner has exhausted his State remedies. The claims (but for such exception) raised in the instant petition were argued in his appeals to the New York State Courts. Title 28 U.S.C. § 2254(b) and (c).

II

With respect to petitioner's jury trial claim, considering the nature of the findings required in New York's sex offender proceedings as specified in Bailey, and incorporating the mandate of Specht that these findings be "adequate to make meaningful any appeal", it is apparent that a jury trial cannot be one of those rights which is required by the Due Process Clause in these proceedings. Such findings are similar to those traditionally made by a judge in the discretionary exercise of his sentencing function and are inconsistent with the jury's sole function in most criminal cases of determining guilt or innocence. A judge alone can assess the expert medical opinions of psychiatrists, including their predictions of the convicted offender's future adjustment to treatment and to society at large, and make findings which can provide an adequate basis for appellate review.

The findings made by Judge Kelly in the instant case illustrate this point. Judge Kelly discussed the testimony of the two psychiatrists who examined the petitioner reciting the basis for their recommendations and their specific findings and then stated:

"Based on all of the testimony, I now find that the defendant is not capable to (sic) being returned to society; that he definitely would present a danger to society, if released at this time, and that in a continued controlled environment, there is a possibility that he may be benefited by the treatment which he will be afforded."

Judge Kelly's analysis of the evidence and his specific findings were as the U.S. Supreme Court stated in Specht essential "to make meaningful any appeal" which might follow.

III

As to petitioner's claim that due process further requires that the applicable standard be proof "beyond a reasonable doubt", Mr. Justice (then Judge) Paul Kelly has filed an affidavit herein wherein he states that he applied the beyond a reasonable doubt standard at petitioner's re-sentencing hearing. While petitioner's attorney vigorously questions this sworn statement of Mr. Justice Kelly in an unsigned and unverified memorandum filed in opposition thereto, he has not served or filed any affidavit or other evidence which directly or indirectly refutes the same.

Assuming arguendo that petitioner is correct in his contention that the applicable standard is "beyond a reasonable doubt", there would appear to have been no error committed at least at the State Court trial level. To the extent, if at all, that the State Appellate Courts may not have applied such standard on appeal in evaluating the sufficiency of the evidence to meet such standard as did Judge Kelly, petitioner's application for an appropriate writ would appear to be more properly addressed to the State Courts than to this Court. See 83 Harvard Law Review 1038, 1096 (lines 7-10).

IV

Finally, with respect to the petitioner's claims of deprivation of the right to remain silent and to counsel during the psychiatric examination preceding his confinement, we note that the petitioner cites no direct authority to support this contention that due process requires these safeguards in this context. Moreover, there are strong policy considerations to support the contrary view. It would prove extremely difficult for a psychiatrist who depends on his trained skills of observation and interpretation to make a clinical analysis, as is required in these cases, if it were possible for a defendant to invoke his rights to remain silent and/or to consult with an attorney whenever he deemed it appropriate.^{4/}

^{4/} The same policies cited by the Second Circuit in denying the right to counsel in parole release hearings would militate against requiring that counsel be permitted in these proceedings as well. Holup v. Gates, 544 F.2d 82 (2d Cir. 1976); see also, Wolff v. McDonnell, 418 U.S. 539 (1974) (no right to counsel in prison disciplinary proceedings).

Furthermore, these rights were not enumerated in Specht although they had earlier been incorporated within the Fourteenth Amendment. See Miranda v. Arizona, 384 U.S. 436 (1966). Thus, the petitioner cannot claim that the Supreme Court's failure to enumerate these rights was a result of their relatively recent application to the states.

For the foregoing reasons, petitioner's application for a writ of habeas corpus must be, and the same hereby is, denied.

Thomas C. Platt

U.S.D.J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MAR 10 REC'D

LEWISTOWN COUNTY
CRIMINAL DIVISION

DAVID HOLLIS,

Petitioner,

76C 1083

-against-

MEMORANDUM AND
ORDER

HAROLD J. SMITH, Superintendent,
Attica Correctional Facility,

March 7, 1977

Respondent.

PLATT, D.J.

On February 9, 1977, this Court denied petitioner's application for a writ of habeas corpus. On February 22, 1977, the petitioner's attorney submitted a letter to this Court requesting that the Court reconsider its decision on one of the petitioner's claims or, in the alternative, grant a certificate of probable cause pursuant to Title 28 U.S.C. § 2253.

Petitioner contends in support of his motion for reconsideration that he was entitled to an evidentiary hearing to contest the facts contained in an affidavit submitted by Mr. Justice Kelly which stated "unhesitatingly" that he applied the "beyond a reasonable doubt" standard at the time of the petitioner's hearing in the County Court. For the reasons set forth in our prior opinion in this case we think that the petitioner's claim is more properly addressed to the State Courts. It was the petitioner himself who, in response to Mr. Justice Kelly's affidavit, argued inter alia that the State Appellate Courts had not reviewed Mr. Justice Kelly's

findings on the basis set forth in the affidavit. See, "Petitioner's Memorandum in Opposition to Consideration of the Kelly Affidavit," pp. 18-19; and, petitioner's letter of February 22, 1977, p. 5, third full paragraph. Since evidence crucial to the petitioner's claim was not presented to the State Appellate Courts he has not exhausted his state remedies. See 83 Harv. L. Rev. 1038, 1096 lines 7-9. The petitioner's remedy at this point is by way of an appropriate writ to the State Courts in which he may contest the findings of Mr. Justice Kelly which it now appears were based on the "beyond a reasonable doubt" standard.

Petitioner's second argument, that he is entitled to a certificate of probable cause is based on his interpretation of a line of cases which hold that a petitioner need not exhaust state collateral remedies if his claim has been presented to the State Appellate Courts.

We note initially that Congress' rationale in requiring State prisoners to obtain certificates of probable cause was to "eliminate the abuse of the writ of habeas corpus in the federal courts by undue interference with state process incident to protracted appellate proceedings in frivolous cases." Ex parte Farrell, 189 F.2d 540, 543 (1st Cir.), cert. denied sub nom., Farrell v. O'Brien, 342 U.S. 839 (1951). See also United States ex rel. Siegal v. Follette, 290 F.Supp. 636 (S.D.N.Y. 1968). Some courts have said that a certificate of probable cause requires a "substantial question worthy of consideration." United States ex rel. Stewart v. Ragen, 231 F.2d 312 (7th Cir. 1956). Other courts have stated

that there must be "federal questions adequate to deserve encouragement to proceed further." United States ex rel. Jones v. Richmond, 245 F.2d 234 (2d Cir.), cert. denied, 355 U.S. 846 (1957). However, no matter which standard is chosen, this Court finds no basis at this time for granting the certificate. As we have noted, evidence crucial to the petitioner's claim was not presented to the State Appellate Courts, and thus he has not given those State Courts an opportunity to adequately review Mr. Justice Kelly's findings. Moreover, to allow the petitioner to present his claims regarding his rights to a jury trial and the other constitutional protections to the Second Circuit Court of Appeals at this point would not serve the interest of judicial economy since the petitioner may later ask this Court (and if he is unsuccessful here, the Federal Appellate Courts) to review his claim regarding the "beyond a reasonable doubt" standard.

Furthermore, courts have required exhaustion of state collateral remedies when the claim raised differs from that presented to the State Appellate Courts, See 83 Harv. L. Rev. 1038, 1095, or when the petitioner has not provided the State Courts with all of the essential facts. Anderson v. Casscles, 531 F.2d 682 (2d Cir. 1976); United States ex rel. Cleveland v. Casscles, 479 F.2d 15 (2d Cir. 1973); United States ex rel. Gentile v. Mancusi, 426 F.2d 238 (2d Cir. 1970); United States ex rel. Boodie v. Herold, 349 F.2d 372 (2d Cir. 1965). In this case, petitioner has conceded that the State Appellate Courts did not review Mr. Justice Kelly's decision with the "beyond a reasonable doubt standard" in mind. Thus,

it is appropriate to require that the petitioner exhaust such remedies at this time.

Finally, we think that the record should be set straight with respect to petitioner's counsel's highly improper and somewhat impertinent charge that this Court has been engaged in ex parte communications with the Attorney General's Office, "in order to introduce into this case a factual issue that had not been contested by the parties". During the Court's deliberations on the issues presented in this case it became apparent to the Court that both sides "assumed" that Mr. Justice Kelly had applied something less than the "beyond a reasonable doubt" standard in the State Court proceedings although the record contained no direct evidence to support this assumption. Thus, the Court communicated with both sides in order to request an affidavit from Mr. Justice Kelly outlining the standard that he had applied. The Court was told by petitioner's attorney's office that he was away at the time. The Assistant Attorney General was directed to forward a copy of any affidavits that he obtained to the petitioner's counsel, which he did. Apparently upon the petitioner's counsel's return, he telephoned the Court and after he was informed of the Court's actions requested additional time to respond to the affidavit. The request was granted. Several weeks later the petitioner's counsel submitted the brief in opposition to the affidavit as well as certain State Court briefs directly to Chambers, all of which were considered in arriving at a decision in this case.

For the foregoing reasons, the motion to reconsider the prior decision is granted and the Court, on reconsideration of its decision, adheres to it. The application for a certificate of probable cause pursuant to Title 28 U.S. C. § 2253 is denied.

Theron C. Pitt

U.S.D.J.

UNITED STATES COURT OF APPEALS

Second Circuit



At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 2nd day of June, one thousand nine hundred and seventy-seven.

David Hollis,

Petitioner,

v.

Harold J. Smith, Superintendent,
Attica Correctional Facility,

Respondent.

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LEC
CRIMINAL DIVISION

It is hereby ordered that the motion made herein by counsel for the

~~appellant~~

~~appellee~~

petitioner

~~respondent~~

~~by notice of motion dated~~ for a certificate of probable cause

be and it hereby is granted

~~denied~~

GRANTED

It is further ordered that

[Handwritten signature]
Robert W. Carter

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

NO. 76 C 1083

-----x
~~UNITED STATES OF AMERICA~~ ex rel
DAVID HOLLIS

Petitioner

-against-

HAROLD J. SMITH, Superintendent, Attica
Correctional Facility

Respondent

:
:
:
O R D E R
:
:

-----x
Upon the verified petition for a writ of habeas corpus
on file herein, it is hereby

ORDERED that the respondent appear before a judge of
this Court at the United States Courthouse, Cadman Plaza,
Brooklyn, New York on the 2ND day of JULY, 1976, at 11:30
A.M./P.M., or as soon thereafter as counsel may be heard, to
show cause, if any, why an order should not be entered directing
that a Writ of Habeas Corpus issue against the respondent.
Petitioner's appearance is not required on the return date of
this motion.

ORDERED that a copy of this order, together with the
papers upon which it is granted be served by mail upon the
Attorney General of the State of New York, on or before the 16TH
day of JUNE, 1976.

~~The Clerk of the Court is directed to file these
papers without prepayment of fees.~~

LC/ THOMAS C. PLATT
UNITED STATES DISTRICT JUDGE
EASTERN DISTRICT OF NEW YORK

DATED: Brooklyn, New York
JUNE 11, 1976.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

NO.

----- -X
UNITED STATES OF AMERICA ex rel :
DAVID HOLLIS :
 :
Petitioner :
 :
-against- :
 :
HAROLD J. SMITH, Superintendent, Attica :
Correctional Facility :
 :
Respondent :
----- -X

PETITION FOR A WRIT OF HABEAS CORPUS

I. (Jurisdiction)

This is an application for a writ of habeas corpus to relieve the petitioner of illegal custody imposed upon him by the State of New York in violation of the Constitution of the United States. A United States District Court is authorized to entertain the application by 28 U.S.C. §2241 (a).

II. (Parties)

Petitioner is a citizen of the United States and a resident of the State of New York. Petitioner is currently incarcerated in the Attica Correctional Facility in Attica, New York. Respondent is the Superintendent of the Attica Correctional Facility.

III (Circumstances of Custody)

Petitioner plead guilty to a charge of assault in the second degree with intent to commit rape (N.Y. Penal Law of 1909 §242) on September 23, 1965. He was not sentenced under the five year maximum provision for the crime, but, instead petitioner was sentenced as a sex offender on December 8, 1965, to an indeterminate term of imprisonment of one day to life. This sentence was later vacated and a hearing was conducted pursuant to Specht v. Patterson, 386 U.S. 605 (1967), and People v. Bailey, 21 N.Y.2d 588 (1968), to determine whether it was appropriate to sentence the petitioner as a sex offender. Petitioner's request that the hearing be conducted as a jury trial was denied. After the hearing petitioner was resentedenced nunc pro tunc on February 25, 1969, in the County Court of Nassau County (Kelly, J.) to the same indeterminate sentence of one day to life. Petitioner is currently incarcerated pursuant to that sentence.

While he was on parole from the sentence of one day to life petitioner plead guilty to attempted criminal possession of a forged instrument in the second degree and was sentenced on April 9, 1974, in the County Court of Nassau County (Tomson, J.) to an indeterminate term of imprisonment of one-and-a-half to three years. Petitioner is currently incarcerated pursuant to that sentence. No challenge to that sentence is raised herein, but it is relevant to the question of jurisdiction.

IV (Claims)

A. On information and belief, the petitioner is not receiving the psychiatric and rehabilitative treatment that is required to justify his sentence of one day to life under the due process and equal protection provisions of the Fourteenth Amendment to the United States Constitution and the cruel and unusual punishment provision of the Eighth Amendment to the United States Constitution.

B. Petitioner also contends that the procedure used in sentencing him to an indeterminate prison term of one day to life violated his rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution in that he was denied the right to a jury trial, the right to have the facts underlying the sex offender determination proven beyond a reasonable doubt, the right to remain silent and the right to the assistance of counsel at all stages of the proceedings against him.

C. Petitioner also claims that he is entitled, under the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution, to certain procedural and substantive rights relevant to the decision to keep him incarcerated. As a matter of equal protection petitioner is entitled to the same safeguards as are granted to persons civilly committed as mentally ill because the maximum definite prison term that the petitioner could have received has expired. These same safeguards are also, in large part, guaranteed by the due process clause. They are the right to a jury trial on

the question of whether the petitioner should be kept in prison, the right to have the State meet a burden of proof of beyond a reasonable doubt in this proceeding, the right to counsel, the right to confront and cross-examine the witnesses against the petitioner, the right to call witnesses in his behalf, the right to have the rules of evidence applied, the right to appellate review of the trial, and the right to release criteria that are precise and that are not more stringent than the criteria employed in civil commitments.

V (Exhaustion of State Remedies)

A. With respect to petitioner's claim of lack of psychiatric and rehabilitative treatment, there are no available remedies in the New York courts. Petitioner is serving two sentences and is barred from securing a writ of habeas corpus in the New York courts by the doctrine of prematurity - a doctrine that has been abandoned by the federal courts. No other remedy with regard to this claim is or would ever be jurisdictionally available to the petitioner.

B. With respect to petitioner's claim that the procedure used in re-sentencing him to a term of one day to life was invalid, state remedies have been exhausted. Petitioner appealed from his resentencing to the Appellate Division, Second Department, which, in a memorandum opinion, affirmed the adjudication of petitioner as a sex offender properly sentenced to one day to life and rejected on the merits petitioner's contentions regarding his resentencing that are advanced herein (Order and

Opinion of May 4, 1970). Petitioner then unsuccessfully sought leave to appeal to the New York Court of Appeals by application to the Hon. Charles D. Breitell. A copy of the Appellate Division Order on Appeal and a copy of Judge Breitell's Certificate Denying Leave to Appeal are attached.

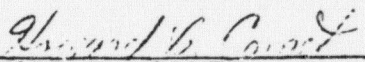
In addition, petitioner instituted a pro se action for a writ of habeas corpus challenging his resentencing. The petition was denied in the Nassau County Supreme Court and on appeal to the Appellate Division, Second Department, this case was consolidated with the petitioner's direct appeal from his resentencing. The Appellate Division affirmed the denial of the writ, stating in a memorandum opinion that the issues raised were the same as those raised in the direct appeal and that, "As in that case, we find appellant's contentions to be without merit." Both memorandum opinions are reported at 34 A.D.2d 786. The order of the Appellate Division affirming the denial of the writ is attached.

C. With respect to petitioner's claim that the State, in keeping him in prison, is denying him certain procedural and substantive rights, there is no procedure available by which petitioner may raise these contentions in the New York courts for the reasons discussed in sub-paragraph IV (A) supra.

D. With the exception of the state petition for a writ of habeas corpus discussed in sub-paragraph IV (B) supra, no previous petition for a writ of habeas corpus has been made to this or any other court.

WHEREFORE, petitioner respectfully requests that:

1. A writ of habeas corpus be directed to respondent;
2. Respondent be directed to appear and answer the allegations of this petition;
3. Petitioner be relieved of the unconstitutional adjudication that he is a sex offender properly sentenced to a term of one day to life and be discharged from custody;
4. Petitioner be discharged from custody pursuant to the sentence of one day to life on the ground that such custody is unconstitutional because petitioner is not receiving the required psychiatric and rehabilitative treatment.
5. Petitioner be discharged from custody pursuant to the sentence of one day to life on the ground that such custody is unconstitutional because, in maintaining him in prison, the State is violating petitioner's rights under the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution;
6. Petitioner be allowed such other, further and alternative relief as may seem just, equitable and proper under the circumstances.



HOWARD B. COMET

STATE OF NEW YORK)
) ss.:
COUNTY OF NASSAU)

HOWARD B. COMET, being duly sworn, deposes and says:

That he is the attorney for petitioner in the within action; that he has read the foregoing petition and knows the contents thereof; that the same is true to deponent's own knowledge, except as to matters therein stated to be alleged on information and belief and, as to those matters, deponent believes them to be true.

Howard B. Comet
HOWARD B. COMET

Sworn to before me this

28th day of May, 1976.

Lorraine C. Paxon

LORRAINE C. PAPAS
Notary Public, State of New York
No. 30-4501793
Qualified in Nassau County
Certificate filed in Nassau County
Commission Expires March 20, 1972

At a Term of the Appellate Division of the Supreme Court
of the State of New York, Second Judicial Department,
held in Kings County on May 4, 1970

~~HON. GEORGE J. BELDOCK, Presiding Justice~~

HON. MARCUS G. CHRIST

HON. ARTHUR D. BRENNAN

HON. SAMUEL WABER

HON. JAMES D. HOPKINS

HON. DAVID BENJAMIN

HON. FRED J. MUNDER

HON. M. HENRY MARTUSCELLO

HON. HENRY J. ABLETT

HON. PHILIP H. KLEINER

Presiding Justice

Associate Justices

The People of the State of New York,

Respondent,

v.

David Hollis,

Appellant

Order on Appeal from
Judgment of Conviction

In the above entitled action, the above named David Hollis,

defendant in this action, having appealed to this court from a judgment of the County

Court, Nassau County, rendered February 25, 1969 upon resentencing,
convicting him of assault in the second degree with intent to commit
rape, upon his plea of guilty, and sentencing him to an indeterminate
prison term of one day to life;

and the said appeal having been submitted by Matthew Maraskin,

Esq., of counsel for the appellant, and by Cino Papa, Esq.,

of counsel for the respondent, and due deliberation having been had thereon; and upon this court's

opinion and decision slip heretofore filed and made a part hereof, it is:

ORDERED that the judgment insofar as appealed from is hereby unanimously
affirmed.

State of New York

Court of Appeals

BEFORE: HON. CHARLES D. BREITEL, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK.
Respondent,

CERTIFICATE

DENYING

against

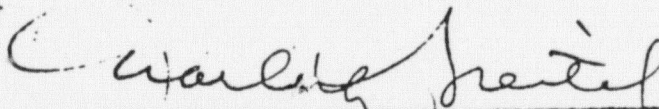
DAVID HOLLIS,

LEAVE

Defendant-Appellant.

I, CHARLES D. BREITEL, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above named appellant for a certificate pursuant to §520 of the Code of Criminal Procedure, and upon the record and proceedings herein, there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at New York , New York
May 15 , 1967



Associate Judge

* Matthew Muraskin, Esq.
Legal Aid Society
Nassau County Court House
Mineola, New York 11501

Hon. William Cahn
District Attorney, Nassau County
Court House
Mineola, New York 11501

Hon. Raymond J. Cannon, Clerk
Court of Appeals

*Briefs returned at office

C

At a Term of the Appellate Division of the Supreme Court
of the State of New York, Second Judicial Department,
held in Kings County on May 4, 1970

HON. GEORGE J. BELDOCK, Presiding Justice

HON. HENRY L. UGHETTA

HON. MARCUS G. CHRIST

HON. ARTHUR D. BRENNAN

HON. SAMUEL RAVIN

HON. JAMES D. HOPKINS

HON. A. DAVID BENJAMIN

HON. FRED J. MUNDER

HON. H. HENRY MATTEUCCIO

HON. JAMES J. LATTI

HON. JAMES H. HARRIS

Presiding Justice

Associate Justices

The People, etc., ex rel. David Hollis,

Appellant,

v.

Arthur E. Krueger, Warden of the Nassau
County Jail,

Respondent.

Order on Appeal
from Judgment—Civil Action
or Proceeding

In the above entitled cause, the above named David Hollis, relator,
having appealed to this court from a judgment of the
Supreme Court, Nassau County,
dated entered May 26, 1969, which dismissed a writ in a habeas
corpus proceeding;

the said appeal having been submitted by

Matthew Muraskin,

Gino Papa,

Esq., of counsel for the appellant, and by

Esq., of counsel for the respondent;

due deliberation having been had on said appeal, and upon this court's opinion and decision
slip heretofore filed and made a part hereof, it is:

ORDERED that the judgment ~~insofar as~~ appealed from is hereby unanimously
affirmed, without costs.

COUNTY Court

OF THE COUNTY OF NASSAU

THE PEOPLE OF THE STATE OF NEW YORK

against

DAVID HOLLIS

Defendant

THE GRAND JURY OF THE COUNTY OF NASSAU by this indictment accuse the defendant
ATTEMPTED
of the crime of / RAPE IN THE FIRST DEGREE,

committed as follows:

The defendant, DAVID HOLLIS, in the County of Nassau, State of New York, on or about the 11th day of June, 1964, did attempt to perpetrate an act of sexual intercourse with Wilhelmina Galbraith a female not his wife, against her will and without her consent.

SECOND COUNT

AND THE GRAND JURY OF THE COUNTY OF NASSAU by this indictment further accuse the defendant of the crime of ASSAULT IN THE SECOND DEGREE, committed as follows:

The defendant, DAVID HOLLIS, in the County of Nassau, State of New York, on or about the 11th day of June, 1964, assaulted said Wilhelmina Galbraith, a female not his wife, with intent to commit upon her the crime of rape.

THIRD COUNT

AND THE GRAND JURY OF THE COUNTY OF NASSAU by this indictment further accuse the defendant of the crime of ASSAULT IN THE SECOND DEGREE, committed as follows:

The defendant, DAVID HOLLIS, in the County of Nassau, State of New York, on or about the 11th day of June, 1964, wilfully and wrongfully assaulted Wilhelmina Galbraith, by brandishing her with a knife, the same being a weapon, instrument and thing likely to produce grievous bodily harm.

All of the acts and transactions alleged in each of the several counts of this indictment are connected together and form parts of a common scheme and plan.

Dated: August 28th, 1964

William C. Baker

No.

Filed day of 19

Pleas

Bond \$

COUNTY COURT

Nassau County

THE PEOPLE

vs.

DAVID HOLLIS

Defendant

WILLIAM CAHN

District Attorney

Indictment for
ATT. RAPE FIRST DEG., ASSAULT
SECOND DEGREE (2 cts)

A TRUE BILL

C. J. Spota Acting
Foreman

Thomas J. Spota

Counsel,

Tried the day of 19

Verdict,

Sentenced,

DAES-5M-8/64

The District Attorney felt that the interests of justice were satisfied by the plea herein after a review of the law and the facts, the background of the defendant and the potential punishment he could receive under this plea.

Dated: September 23, 1965

WILLIAM CAHN
District Attorney

By *Arthur V. Nixon*
Arthur V. Nixon
Assistant District Attorney

COUNTY COURT : NASSAU COUNTY

PART IV

----- x
THE PEOPLE OF THE STATE OF NEW YORK :

-against- :

DAVID HOLLIS, : Ind. #20287

Defendant. :

----- x
Mineola, New York
September 23, 1965

B e f o r e:

HON. JAMES L. DOWSEY, County Court Judge.

A p p e a r a n c e s:

MARTIN W. MASSELL, ESQ., Assistant District Attorney
for the People.

GILBERT RIESS, ESQ.,
for the Defendant.

MINUTES OF CHANGE OF PLVA

(The following occurred during trial:)

THE CLERK: All witnesses are excluded from the
courtroom. If there are any in the courtroom they may
leave now.

MR. MASSELL: Judge, may we approach the bench.

THE COURT: Yes, counsel.

(There was a conference at the bench not within the hearing of the reporter.)

THE COURT: Is this perfectly satisfactory?

MR. RIESS: It is satisfactory, your Honor.

THE COURT: All right.

MR. MASSELL: Your Honor, then, in the presence of the jury at this time the defendant through his attorney has offered to plead to the second count of the indictment in satisfaction of the indictment, the second count being: "And the grand jury of the County of Nassau by this indictment further accuse the defendant of the crime of assault in the second degree, committed as follows: The defendant, David Hollis, in the County of Nassau, State of New York, on or about the 11th day of June, 1964, assaulted said Wilhelmina Galbraith, a female not his wife, with intent to commit upon her the crime of rape."

This plea is satisfactory to the District Attorney's office. We recommend this plea to the Court, and I feel that the interests of justice will be served in the taking of this plea by the Court.

THE COURT: Satisfactory to the defendant?

MR. RIESS: Satisfactory to the defendant, your Honor.

I would like the defendant to make a statement on the record with respect to this plea.

THE COURT: Yes? Step forward, please.

Now you understand perfectly what has been said here by counsel?

THE DEFENDANT: Yes, sir.

THE COURT: And it is agreeable to you to accept this plea in satisfaction of the indictment?

THE DEFENDANT: I accept to the indictment under one basis.

THE COURT: I didn't understand it.

THE DEFENDANT: I accept it because I'm afraid of it.

THE COURT: But you do with a free and open mind realize what the penalty might be in connection with a plea of guilty?

THE DEFENDANT: Well, I feel I have no chance.

THE COURT: Well, I mean, this choice must be yours and yours alone. Nobody has induced you or influenced you by offering you any inducement in connection with

sentence?

THE DEFENDANT: No. I feel that I would have a better chance this way.

THE COURT: Anything else you want to say?

MR. RIESS: If your Honor would ask him if he advised me that he would accept this plea and that the advice didn't come from me to accept the plea.

THE COURT: Is that true?

THE DEFENDANT: That's true.

THE COURT: All right, the defendant indicates that is true. I think there is no question that this is an open choice on his part uninfluenced by any promise from any source, counsel, the District Attorney or the Court concerning sentence.

MR. RIESS: That is true, your Honor, and the underlying fact I want on the record is the fact that the defendant told me to see if he can get this plea, and I told him that I would try.

THE COURT: All right, this is his choice and the application is granted.

THE CLERK: David Hollis, you appear with counsel, Gilbert Riess?

THE DEFENDANT: That's correct.

THE CLERK: Do you wish to withdraw your plea of not guilty heretofore entered on April 8, 1965 to this indictment and to plead to the second count of this indictment, assault in the second degree, is that correct?

THE DEFENDANT: Yes.

THE CLERK: Before I can enter your plea I must inform you pursuant to Section 335-b of the Code of Criminal Procedure any prior conviction that may be proven you are liable to additional punishment. Do you understand that?

THE DEFENDANT: Could you explain that?

(The defendant in conference with counsel.)

THE COURT: Before you go any further, will counsel approach the bench.

(There was a conference at the bench not within the hearing of the reporter.)

THE CLERK: David Hollis, I will repeat it again: By direction of the Court you are informed pursuant to Section 335-b of the Code of Criminal Procedure any prior conviction which may be proved you are liable to additional punishment. Do you understand that?

THE DEFENDANT: Yes, sir.

THE CLERK: Now you wish to withdraw your plea of not guilty entered on April 8, 1965 to this indictment and to plead guilty to the second count of this indictment, assault in the second degree, in satisfaction of this indictment, is that correct?

THE DEFENDANT: That's correct.

THE CLERK: Your plea is guilty to the second count of this indictment, assault second degree?

THE DEFENDANT: Yes.

THE CLERK: In satisfaction?

THE DEFENDANT: Yes, sir.

(Defendant sworn; pedigree taken.)

THE CLERK: Date of sentence, your Honor?

THE COURT: Let's hold this date of sentence for a while. I believe there is another indictment to be disposed of.

MR. RIESS: Yes, your Honor.

THE COURT: We will put it down for the same sentence if there is an application in connection with that.

MR. MASSELL: I understand he's going to plead to that indictment. I don't know the indictment number. I know it's bail jumping, Judge, but I don't know the

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number of the indictment.

THE COURT: Now, can you proceed, Mr. Clerk, without the other indictment? I'll take a plea on that other indictment as soon as we get the papers together, but for the time being sentence will be set for November 5th. Is that satisfactory to you?

MR. RIESS: Right now I think.

THE CLERK: Defendant remanded?

THE COURT: Yes.

MR. MASSELL: Is the plea explained fully to the defendant now? That's the second count of the indictment, that's assault two with the intent to commit rape now.

THE COURT: Well, Mr. Riess, I assume you explained it fully?

MR. RIESS: I did. We discussed that?

THE DEFENDANT: He just explained it to me, assault two.

MR. RIESS: Attempt to commit rape. When I spoke to you before I told you the second count was assault two with intent to commit rape?

(No response.)

Didn't I tell you that? When I discussed it with

you didn't I tell you assault two with intent to commit rape?

THE DEFENDANT: Yes.

THE COURT: November 5th.

Now, does the defendant fully understand the crime to which he is pleading and the possible consequences?

THE DEFENDANT: Yes, sir.

THE COURT: All right.

COUNTY COURT : NASSAU COUNTY
PART I

-----X
THE PEOPLE OF THE STATE OF NEW YORK :

- against - : Ind. #20287

DAVID HOLLIS, :

Defendant :

-----X
Mineola, New York
January 21, 1969

B E F O R E:

HONORABLE PAUL KELLY
County Court Judge

A P P E A R A N C E S:

GIRO CESTARO, ESQ.
Assistant District Attorney
For the People

JAMES J. MC DONOUGH, ESQ.
Legal Aid Society
Attorney for Defendant
BY: MICHAEL MEYER, ESQ., of Counsel

- - -

MINUTES OF PSYCHIATRIC HEARING

- - -

Anthony Cavallo
Official Court Reporter

THE CLERK: People versus David Hollis. Hearing
on report of psychiatrist.

MR. CESTARO: People ready.

MR. MEYER: For the record, Your Honor, I
would like for the purpose of this hearing to
demand a jury trial on the particular issues that
have to be resolved under Section 2189. I don't
cite any cases, but I do demand a jury trial.

THE COURT: That's denied. Let's go.

MR. CESTARO: People call Dr. Pechstein.

D R. H E N R Y P A U L P E C H S T E I N,
residing at 220 Hilton Avenue, Hempstead, New York,
called as a witness on behalf of the People, was
sworn by the Clerk and testified as follows:

MR. MEYER: Your Honor, I move to exclude any
other witnesses.

MR. CESTARO: I object to that. I have one
other doctor here who is a witness, but I believe
he should be permitted to stay.

THE COURT: I don't see any reason to exclude
a doctor, unless you have some specific reason.

MR. MEYER: Yes, sir. Both doctors have

examined the defendant, and I think it gives -- it would be much fairer if I can have an opportunity to examine both the doctors separately. If one doctor is here and hears the gist of the cross examination, it gives that doctor a chance to prepare himself, and, possibly, change some of his outlooks with respect to it. I am not saying in any way it would --

MR. CESTARO: May I say this: Both doctors have joined in one report. I believe the innuendoes are highly improper. I believe the request is unusual and I again object to such a request in this case.

THE COURT: I will grant the application.

The witness is excluded.

DIRECT EXAMINATION

BY MR. CESTARO:

Q Doctor, are you duly licensed to practice medicine in the State of New York?

A Yes, I am.

Q How long have you been so licensed?

A Licenesed in December, 1947.

Q Do you have an office to practice?

A Yes. I practice psychiatry in Hempstead.

THE COURT: Do you concede Dr. Pechstein's qualifications?

MR. MEYER: May I just ask a few questions with respect to that?

THE COURT: Yes.

VOIR DIRE EXAMINATION

BY MR. MEYER:

Q Doctor, are you a member of the American Psychiatric Association?

A Yes, I am. No, I am a Fellow of the American Psychiatric Association.

Q I understand. And in your office, do you have "Diagnostic and Statistical Manual of Mental Disorders" published by the American Psychiatric Association?

A Second edition.

Q Also in your office, doctor, do you have "Psychiatry in the Law," a book called "Psychiatry of the Law"?

A No, I do not.

Q Doctor, do you have a book in your office --

MR. CESTARO: I object to this.

THE COURT: No. I will permit it. Go ahead.

MR. CESTARO: If he wants to cross-examine on qualifications, it's one thing.

THE COURT: Go ahead.

Q Doctor, what books do you rely on as authorities in the field of psychiatry dealing with sociopaths?

A I don't use any books as authority. We know so little about this that there are some reference books, reference texts that can be referred to.

THE COURT: Just a moment. This voir dire should be on the doctor's qualifications as a qualified psychiatrist.

MR. MEYER: That's what I am trying to go into.

THE COURT: Now, the question of what books he reads is not under that basis. His education, his background, his experience, that's what you should be interested in.

MR. MEYER: Yes, Your Honor.

Q How long have you been practicing psychiatry, doctor?

A I started residency in psychiatry in 1946.

Pechstein - direct
voir dire

Q And after that, doctor, how long have you been working with Meadowbrook Hospital?

A Meadowbrook?

Q Yes, with the hospital.

A I think I've been there since 1950.

Q And during the course of that time, doctor, you have had an opportunity to research in this particular field, have you not?

A I examined prisoners to determine whether they can stand trial and with reference to examinations such as this today.

Q Have you done any research in the field of sociopaths?

A No, I have not.

Q Have you read any particular articles or books in that particular field?

A Yes, I have.

MR. CESTARO: I again object to this line of questioning.

THE COURT: I am going to permit you to go ahead and give the doctor's qualifications. Then you can examine yourself. I thought we could

shortcut this, but apparently we can't.

DIRECT EXAMINATION CONTINUED

BY MR. CESTARO:

Q Doctor, do you have any specialty?

A I am a psychiatrist.

Q Will you give us your medical education and training, pertaining to psychiatry?

A I graduated Jefferson Medical College in 1945. I interned in that hospital, associated with that school and after that I had a residency partly with the Veterans Administration Hospital in Northport and with the New York State Hospital system. I have my Boards in psychiatry and neurology in June, 1952. I am a qualified psychiatrist in the State of New York.

Q And have you had any special experience or training in the field itself, outside of your medical training?

A You mean as far as working with prisoners?

Q Yes.

A By examining prisoners for the Court to determine whether or not they can stand trial with reference to other matters and a special interest in sociopaths.

Q And have you testified on various occasions with reference to your examinations and findings and conclusions in court?

A Yes, sir.

Q And approximately how many times would you say you so testified, roughly?

A I can't say for sure, but quite a few times.

Q Over what period of time, doctor?

A Well, the past two or three years.

Q Did you have occasion to examine one David Hollis?

A Yes, I did.

Q And was that pursuant to an appointment by the Superintendent of Meadowbrook Hospital?

A It was upon the Court Order, and we were appointed by the hospital superintendent to examine him in accordance with the Court Order.

Q Now, when did you examine David Hollis?

A November 14, 1968.

Q And where did you examine him?

A At Meadowbrook Hospital.

Q For how long a period of time did you examine

him?

A Forty-five minutes.

Q Will you tell us what your examination consisted of?

A Review of the records available to us, the probation report, and speaking with the prisoner.

Q Incidentally, did you have an opportunity to advise the defense counsel concerning the contents of the probation report?

A I was reading it. He may have read it over my shoulder.

Q Now, during the course of your interview, will you tell us what questions were asked and what answers were made?

A Not specifically. I don't remember the exact questions, but I asked him about what treatment he had received while he was incarcerated, and I tried to get from him what his thinking was about the crime for which he had been incarcerated, and what his thinking was about the matter today. I also tried to find whether he had any delusional thinking, whether he suffered from hallucinations, whether his memory was intact. The usual

psychiatric examination.

Q Do you recall any of the answers that he gave you, doctor?

A Yes, I do. They were made part of the report.

Q Will you give us those answers for the record?

A Yes. He felt that --~~X~~first, for the record, this man was charged with raping a woman in Old Westbury, or attempting to rape a woman in Old Westbury, and he pled guilty to this. He told me that this woman was actually a paramour of his, and that he had been having intimate relations with her. The probation report did not confirm this. He also mentioned --

MR. MEYER: Objection with reference to the probation report.

THE COURT: Overruled. This is the basis of the doctor's findings. Go ahead.

A [Continued] He also stated that he had seen the light concerning his previous crimes and that he was a changed person, that he was not going to live that type of life anymore. And as an example of this, he stated that he was now contributing funds to mentally retarded children, and he thought of himself as quite a

holy man in this respect.

Q Doctor, based on your interview and your examination of the records and based on your examination of David Hollis, did you come to any medical conclusions regarding his mental state?

A Yes.

Q Tell us what those conclusions are.

A I thought the man was sane in a legal sense, that is, that he could understand the nature of the charges and that he could assist in defending himself to this, if necessary, at this time, and that he could understand the nature of such a hearing as we have today.

I also thought this man was suffering from an anti-social personality disorder with vague paranoid tendencies.

Q And did you reach any conclusions concerning his place in society or how he would react in society?

A From the past record of the present offence and similar offences with a young child previously, in 1954 in Massachusetts, he was arrested in November, 1954, and charged with abuse of a female child, to which he pled guilty and served -- was sentenced from three to

five years. Now, with that history and present history of repeated acts of this nature, plus many brushes with the law, petty thefts, felonies, throughout all of his life which he admitted to, I thought that this man was going to keep repeating these acts.

If given the opportunity, in spite of what he had said, I don't really believe he is a changed man; that he required further care in a treatment setting, in a closed treatment setting, to prevent his performing more of these acts, and for the benefit of society, I thought that he would best be continued in such a closed setting until such time that those in charge of his care would consider him eligible for parole on a trial basis to attempt to rehabilitate him outside a closed setting.

MR. CESTARO: If Your Honor please, I ask that the report be deemed as part of the record of this proceeding. And I have no further question.

THE COURT: All right. Have it deemed as part of the record.

[Above report referred to deemed People's Exhibit 1 in Evidence.]

CROSS EXAMINATION
BY MR. MEYER:

CROSS EXAMINATION

BY MR. MEYER:

Q Doctor, let's talk about the treatment for a little while -- withdrawn.

At the time you saw him for 45 minutes -- do you have any cards to indicate what time he came into the office on that particular day?

A No.

Q And when you testified to 45 minutes, you actually remember it being 45 minutes, or is this what it generally takes for a person to be examined by you?

A No. This was actually 45 minutes.

Q Well, do you know what time he came in?

A Yes.

Q To your office?

A Yes.

Q What time did he come in?

A 2:30.

Q Do you have records to indicate that?

A Yes.

Q And do you know what time he left?

A 3:15.

Q And by that, I mean, you are referring to your report dated November 18, 1968, is that correct?

A Yes.

Q Now, this is the first time and only time you examined the defendant, is that correct?

A Yes.

Q And when you examined him at this particular time and before he came into the office, had you reviewed the probation report?

A It was reviewed for a brief period before he came in and also while I was talking to him.

Q How many pages is the probation report?

A I don't know. There are many pages here, Mr. Meyer, that they are all not read in full. 17 pages.

Q Doctor, is that probation report dated? Do you know when the probation report was made?

A At the time of his sentencing, it was a pre-sentence probation report for the offence in 1964.

Q That would be sometime at the end of 1965, December of 1965, is that correct?

A Earlier in '65. There is mention here made of April, 1965, as the last date. Disposition was made

12/8/65.

Q So, this was compiled sometime prior to that day, to the best of your knowledge.

A Yes.

Q Now, do you have any report on this defendant from 1965 until today?

A No, I do not.

Q And at the examination -- by the way, the other doctor, was he at that examination with you, or did he examine the defendant separately?

A No. We examined him together.

Q And who was the doctor who asked him the questions with respect to his past history, involvement with various crimes, you or the other doctor?

A We both asked these questions.

Q Well, you knew that he had been arrested and pled guilty for assault with attempt to rape in 1965, is that correct? And this is why you were examining with respect to those charges, is that correct?

A Yes.

Q And you asked him about that particular involvement, did you not?

A Yes.

Q At that time he informed you that he was involved, had some form of relationship with this particular woman, is that right? I am talking about the complaining witness in that case.

A Yes.

Q Now, after you had asked him that particular question, he gave you that reply, doctor, and he then told you, as you stated, that he now felt that he had been wrong all along in his various criminal activities that he committed over the years, isn't that correct?

A Yes.

Q And then he also told you, doctor, that he was contributing funds to a retarded children's home, is that correct?

A Yes. That's what he said.

Q Do you know whether or not this is true or not?

A No.

Q Did you ever check up on this?

A No. I have no way of checking.

Q In any event, doctor, based upon the conviction in this crime and the story with respect to the paramour

situation, plus his history of various crimes, prior to this occasion, led you to the conclusion, did it not, that he had an antisocial personality that you previously testified to, is that correct?

A The whole history pointed to that diagnosis.

Q Well, other than the conviction in the crime that we are involved in at this particular time and the long history of involvement in various other crimes, is there anything else that led you to that particular conclusion?

A Of just the anti-social personality part of the diagnosis?

Q Yes.

A No, nothing else. That diagnosis has to be made on history.

MR. MEYER: I move to strike the last part of the answer.

THE COURT: No. I will permit it.

Q Doctor, on direct testimony just a while ago, you said, you said that he had a vague paranoid inclination, is that right?

A Yes.

Q In this report which you made with the other psychiatrist, you never mention anything about paranoia, do you?

A I don't think I mentioned anything about any diagnosis.

Q Well, if you look at the third paragraph, doctor, you did say that the man is suffering from an anti-social personality.

A Yes.

Q And you did not mention anything in this particular report with respect to this individual being paranoid, do you?

A No, but I mention it now.

Q And is there anything within that, his answer and criminal record, which would lead you to believe he is paranoid?

A Not from the criminal record. ~~X~~ This impression is obtained more from the examination made at the time that he was seen in November.

Q In other words, doctor, what we are really saying here is that when he gave you the story that he was having relationships with the complaining witness in

the assault case, this led you to believe that he was paranoid, is that true?

A No.

Q Well, what particular statement did he make to you that led you to believe that he was a paranoid in any degree?

MR. CESTARO: I object to the form of that question. The doctor hasn't testified that there was any one particular statement which led him to a paranoid conclusion.

THE COURT: He is asking him if there was. I will permit it.

A I think you are interested, counselor, why such a diagnosis would be made, but before I can explain that, I have to explain what I mean by paranoia. This is a rather complicated thing.

Q Before we go into that, we will get to that in due time. I just would like to know what led you to that particular belief with respect to this particular defendant.

A The inappropriateness of his present mood and actions when considered with his total life pattern, that

is, him saying that he was a holy man, that he was contributing to the welfare of children, when, on the other hand, his pattern showed that he was everything but a holy man and certainly not contributing to the welfare of children when he raped or tried to rape one.

It's the inappropriateness that the diagnosis was made on.

Q I understand. In other words, there is no question in your mind that he is not a holy man or a person who deeply believes in religion, as far as you are concerned?

A I can't believe that, when I review his past record. He may believe it at this time, but, certainly, it is not in keeping with his behavior.

Q Now, when he says that, you don't think he has -- that he has welfare of children in mind, do you also mean, sir, you don't believe that he is really consciously doing something for children?

A I didn't say that. He may have the welfare of children in mind at this time, but it's not in keeping with his actions of the past. X

Q Doctor, did he tell you anything with respect

to writing that he did, of any sort?

A Not that I recall.

Q Did he tell you anything with respect to submitting articles for publication to various magazines?

A No.

Q Well, aside from the conversation you just told us about, was there anything else he told you about at that examination on November 18?

A Not that I have any recollection of, except questions concerning the various acts which are part of the record.

Q In other words, doctor, you reviewed his past criminal record with him, is that correct?

A In part.

Q Do you have your record with you, doctor, of that examination and the probation report?

A I have a report of that examination and the probation report.

Q Is there anything else in the file with respect to this defendant that you have?

A Not here.

Q Again, do you know that he was in Clinton Prison

from 1965 until August of 1968, is that correct?

A That's true.

Q And you never reviewed that file of his stay in Clinton Prison, is that correct?

A That's true.

Q Can I look at that probation report for a second, doctor?

A [Handing]

Q Doctor, when you diagnosed this anti-social personality, you were referring to the American Psychiatric Association definition of what anti-social personality is, weren't you, doctor?

A Yes.

Q In other words, what we are talking about, basically, is a person who is incapable of significant loyalty to individual groups or social values. Would that be included in anti-social personality?

A Are you quoting --

Q Yes, I am.

A Yes.

Q And those individuals, they are grossly selfish, callous, irresponsible, repulsive and unable to feel guilt

and to learn from experience or punishment, is that correct?

MR. CESTARO: I object to this line of questioning. He is talking about hypothetical matters and theoretical matters, as opposed to the particular case.

THE COURT: Well, the report says that the doctor feels he is suffering from -- suffers from anti-social personality. Now, he is asking him to tell us what that means. I will permit it.

MR. CESTARO: He is not asking him. He is quoting from a manual.

THE COURT: Yes. And he is saying to the doctor, "Do you agree with that?"

That's all right.

WITNESS: May I suggest that I read into the record the American Psychiatric --

THE COURT: No. This man is entitled to cross-examine and he will be permitted to go ahead with it.

MR. CESTARO: I didn't hear that question. May I hear it?

THE COURT: He would like to read something

in from the American Psychiatric Association.

If Mr. Cestaro wishes on his redirect and if it's admissible, we will permit it. But, right now, we are on cross examination.

Go ahead.

Q Doctor, I will read to you this statement from the "Diagnostic and Statistical Manual on Mental Disorder," by the American Psychiatric Association.

A May I see the manual, please?

Q I don't have the second copy. I only have the extract from that particular definition.

A There is a difference. There are two manuals.

Q I know. I am referring to the second manual. I only have the first manual, but I have the definition from the second manual.

Now, tell me if you agree with what they say an anti-social personality is.

"This term is reserved for individuals who are basically unsocialized and whose behavior pattern brings them repeatedly in contact with society. They are incapable of significant loyalty to individual groups or social values. They are grossly selfish, callous,

irresponsive, repulsive and unable to feel guilt or to learn from experience and punishment."

Do you agree with that so far?

A Yes.

Q "Frustration, tolerance is low. They tend to blame others for their behavior."

Do you agree with that, doctor?

A Yes.

Q "A mere history of repeated legal or social offences is not sufficient to justify this diagnosis. Group delinquent reaction or childhood adolescences and social maladjustment without psychiatric disorder should be ruled out before the diagnosis."

Do you agree with that, doctor?

A Yes.

Q So, we then can conclude, doctor, that it isn't every person who is involved with the law on a repeated basis that falls into this category. It isn't just mere recidivism, is it?

A No, it's not.

Q In other words, there are individuals who do constantly get in conflict with the law who would not

fit into this particular category.

A Yes. The dissocial type personality.

Q And for those people, in many instances, a jail term of a specific number of years would be recommended, is that correct?

A That's a legal matter, counselor.

Q Now, with respect to the background of an individual like this, do you have any psychiatric theories of what conflicts would be going on internally with regard to an individual who you would diagnose as an anti-social personality?

A There is very little known about what actually goes on or what the etiology is of such a condition.

Q I asked you this before, when we had this voir dire. In your office, you have -- well, not in your office -- you have, at various times, referred to various reference books, have you, doctor, with anti-social personalities?

A There is quite a bit written on them.

Q Can you tell me the name of some of the articles that you referred to?

A Not offhand. I have to refer to a list.

Q Well, can you mention just one of them? You don't have to right now, doctor, if you don't want to.

A I can't refer to any specific article with the author. There are many things that are read in a lifetime. I can't remember them.

Q In your office, doctor, do you have a library?

A Yes.

Q And do you have books which discuss sociopaths or antisocial personalities in them, in the library?

A Yes.

Q And could you mention some of the books that you have there that might refer to this thing?

A Well, there is Noyes and Culp. There is a textbook on psychiatry.

Q That would be "Modern Clinical Psychiatry"?

A By Noyes and Culp, last edition.

Q Any other books, doctor?

A Kaplan's text of psychiatry, Arietti's "American Handbook of Psychiatry."

Q Well, would you agree with Noyes and Culp --

A Which edition is that?

Q Fifth edition, doctor.

A That's obsolete.

Q Well, just tell me, doctor, whether you agree with this particular statement, referring to anti-social personality.

"They are unable to identify themselves with society and its laws. Punishment is considered as expressions of injustice and have no deterrent effect."

Do you agree with that?

A In part that's true, yes.

Q Well, when you say "in part," which part of it don't you agree with?

MR. CESTARO: I object to that question as having no bearing on this hearing.

THE COURT: No. I will permit it.

WITNESS: You are taking things out of context, counselor, and I can't agree to anything that anybody else says. These men who have written these texts have voiced their opinions. I can't 100% go along with what they say.

Q Okay, doctor. What would you like to add to that particular statement?

A I can't think of anything to add or subtract.

Read it again, please.

Q I am referring to the anti-social personality.

"They are unable to identify themselves with society and its laws. Punishment is considered as expressions of injustice and have no deterrent effect."

MR. CESTARO: If Your Honor please, I object on the basis that there is nothing in the record to indicate that that forms any part of the basis for the doctor's findings in this case.

THE COURT: This is a question of the expert. I will permit it.

WITNESS: All I can say, this is the author's opinion.

Q Well, do you disagree with it, doctor?

A I can't say that I agree with it in its entirety as being so all the time. It's not a universal statement that these people can't learn from anything whatsoever. We all learn from experience.

Q Well, would you say that a person who is in this particular category that the defendant is, that is, Mr. Hollis, is subject to treatment, is amenable to some sort of treatment?

A Yes, I would think so.

Q What type of treatment would you recommend, doctor?

A This is wholly my personal recommendation, and it will not entirely be agreed upon by other psychiatrists.

Q We understand that, doctor.

A ~~X~~ I believe a man who suffers the symptoms that Mr. Hollis does would, without preknowledge, do best under chemotherapy in a closed setting.

By chemotherapy, I mean being given tranquilizers, over a long period of time, and constantly having had his personality reevaluated by someone who is qualified to do so, including psychiatrists, social workers, and jail personnel.

I believe changes will come about in time so that he will no longer react to the basic animal impulses without the control that he should have, the learned control. But, without this, I don't think there is much chance. But, unfortunately, we don't have the setting that you can go ahead and do this.

Q Would you agree then it is possible for an

individual who at one time or another had this anti-social personality to change and adapt or correct the condition, mental condition, is that correct?

A It's possible to modify his emotions so that he can gain better control of them.

Q And as you just said, doctor, this could be accomplished in a closed setting.

A I believe it must be accomplished in a closed setting, with a man who has exhibited the behavior that he has.

Q The behavior that you are referring to is the behavior prior to 1965, and prior thereto, is that correct?

A I have reference mostly to the acts against other people, against the person.

Q But these are acts that took place prior to 1965.

A Yes. ~~X~~

Q Do you know anything about this defendant's childhood, doctor?

A There is mention made of it in the probation report.

Q Well, just referring to the probation report and other than the criminal activity you notice from 1948 onward, do you notice anything in that report which says anything unusual about his relationship with his parents?

A Yes. There is one statement to that effect.

Q Will you tell me what that statement is, doctor?

A I read from the probation report, case #19914 under "Brothers and Sisters."

"Statement by brother, Ulysses Hollis, stated that the prisoner was somewhat of a problem to his family during his youth and he did not respond well to the disciplinary actions undertaken by the parents."

Q Well, this is from a brother.

A Yes.

Q Do you have anything from the parents, any communication from the parents with regard to this?

A No.

Q And isn't there something in that report, doctor, that said that the parents were thought very highly of in the area in Georgia where he was brought up?

A It states that the family enjoyed a fairly good

reputation within the community.

Q Is there anything else about the family in there, doctor, about their problems with David Hollis? Anything by the mother or father at the time, detrimental, which would reflect upon the defendant's conduct?

A No.

Q Doctor, while you examine these various prisoners, do you find many times that they seem to be slightly guarded in their responses to you?

A At times they are.

Q Well, that's natural, isn't it, doctor? Because they recognize that you might testify against them at a subsequent occasion, isn't that true, doctor?

A I tell them that either I or the other examining psychiatrist makes it known to them that ~~they~~ they are being examined, neither for the defense, nor for the People, but for the Court. And that testimony will not be used against them.

Q But, doctor, we could agree that it might very well happen that somebody who finds himself in a prison setting might not very well believe that, and may give untruthful responses to some of the questions you ask,

isn't that true?

MR. CESTARO: Objection. He is talking, again, theoretically, about unknown prisoners and unknown patients.

THE COURT: It's a general situation. I will permit it, if the doctor can answer that question. I don't know whether he can or not.

A It's quite surprising, Your Honor, that they seem to be more at ease than I would anticipate, and there is surprisingly little holding back of information, especially with a man who has been in prison for a period of time.

Q Let me ask you this, doctor: When a prisoner tells you a particular story how an occurrence happens, you never make any independent judgment how it happened, do you?

A No.

Q But at times, do you administer what they call a Rohrschach test?

A I don't. I sometimes have it administered by a psychologist.

Q And the purpose of that test is to show the internal conflicts that may be involved with this

particular patient or defendant, isn't that correct?

A Not quite.

Q Well, you tell me what the purpose of that test is.

A Rohrschach is one of the many preventive tests used by psychologists to help in the diagnosis, to uncover any areas where the diagnosis might not be obvious on clinical examination. It tells us nothing about background or inner thoughts, except how they might be projected onto ink blots.

Q But, at times, is it not used as a diagnostic tool in determining what the conflicts that an individual might have, the strength of, let's say, his super-ego, and suppressing unconscious and conscious motivations?

A I don't think a Rohrschach can give you much information on that.

Q Well, are there any other projective tests that you refer to that would help you in that area?

A No. That's like asking to look into a crystal ball, and there is no test that will do that.

Q In any event, in this particular case, you did not administer or have administered to the defendant

any one of those projective tests, did you?

A No.

Q Now, doctor, in the report you stated that the defendant has a sexual problem. Now, referring to that and other than the two incidents involving the law, is there anything in your examination of the defendant to indicate that he had a sexual problem?

A No, just those two incidents.

Well, I am sorry, no. There may have been other things in the report.

Q Do you want to look at your report to see if it refreshes your recollection?

A It's not in my report, but in the probation report.

Q Just look at your report to see if it refreshes your recollection.

MR. CESTARO: I object to that. He is asking the question as to whether or not there were other acts and the doctor is saying there may have been in the probation report.

THE COURT: The question he is asking, anything in his report that would indicate that. Not in

the other report. If he wants to ask later on, or you, that's all right.

A Not in my report, counselor.

Q Doctor, you said also in the report that the sexual crimes to which he pled guilty are evidence of personality deterioration. Other than the fact that he pled guilty to those two particular crimes, what led you to the conclusion that there was a personality deterioration?

A The fact that he had committed the crimes.

Q Other than that, nothing?

A No.

Q Again, other than the fact that he committed these various crimes, you found nothing to indicate that this defendant was grossly selfish, did you?

A I didn't make a judgment on whether he was selfish or not.

Q Well, when we discussed a little while ago what an anti-social personality was, one of the characteristics you stated was that the individual tended to be grossly selfish, callous, irresponsible or repulsive.

A You stated that from the manual.

Q Right.

A And I just said I made no judgment as to whether this man was selfish or not.

Q I see. Well, did you make any judgment whether or not this defendant, this particular individual had any loyalty to other individuals, let's say?

A I couldn't find any loyalty to individuals. He has been married on two occasions and had just left his wife. During one of the times that he was married, he pled guilty to the crime of sexual attempt on a young child.

Q What you are stating, doctor, a mere act of infidelity shows a strong lack of loyalty in an individual?

A Shows some evidence of it.

Q Isn't it true there are individuals who have tendencies and occasions to be disloyal to ones they are married to, and still are fairly loyal to both their children and wife, over the long run, doctor?

A Over the long run, if they show other evidence of being loyal, yes.

Q And you never spoke to the defendant's wife to find out her attitude towards the defendant, did you?

A No.

Q Did you find anything in your examination of the defendant, that he has no significant loyalty to social values? Let's say civil rights, or something on that order?

A Not just limiting it to civil rights, but the very fact that he was involved in so many petty crimes throughout his lifetime, shows that he didn't have too much loyalty to any social values.

Q When you say "crimes," you are referring to acts and crimes that occurred prior to 1965.

A Yes.

Q Well, did you ask him how he felt towards the civil rights movement?

MR. CESTARO: Objection. I object to this whole line of questioning. He is taking a medical definition of an anti-social person and he is going through every element of that definition and I maintain that that is a roundabout way of going about it, and I maintain the proper inquiry here should be what particular facet of this man's personality actions did he base his findings of

an anti-social personality on. Otherwise, we can go through every textbook, Your Honor please, find every element of anti-social activity which was held in the past to be an element of anti-social persons, and ask whether or not this doctor examined this defendant on that particular element.

THE COURT: Overruled.

MR. MEYER: Thank you.

MR. CESTARO: Exception.

Q Could you answer that last question, doctor?

A Repeat the question.

[Reporter reads back last question.]

A No.

Q Well, the civil rights movement, for instance, would be something that a Negro could identify with in a social value, isn't that true?

A I can't say for sure.

Q Did you find anything other than the criminal activity that we referred to to indicate to you that he had either an unusual or sadistical attitude towards women, other than the fact he was convicted of some

crimes?

A I think there is something here that may refer to that. May I refer to the chart?

THE COURT: Yes.

A [Continued] I can answer that by referring to the probation report again.

Q Doctor, not referring to the probation report, but referring to your recollection when you made that report and diagnosis, what you had in your mind when you made the diagnosis.

THE COURT: What is the question?

MR. MEYER: The sadistical attitude towards women.

WITNESS: Yes. There is some evidence of that here.

Q Other than the fact of the criminal record, is that true, doctor?

THE COURT: The criminal acts, you mean?

MR. MEYER: Yes.

A Yes. It's under "Marital History" in the probation report.

Q Are you referring to the fact that he was

married twice?.

A No.

Q Well, can I see that, doctor?

MR. CESTARO: If Your Honor pleases, I submit this is improper. He has the probation report which --

MR. MEYER: I am not showing the defendant anything.

MR. CESTARO: He is reading it and then asking questions based on it. We must assume that's what he is doing, judge.

THE COURT: Are you going to be much longer with this witness?

MR. MEYER: No.

THE COURT: If you are, we are going to put it over to the next day.

Q Doctor, tell me what you found that led you to that belief?

A I think the word you used was "sadistic" and "incosiderate."

Q Sadistic attitude towards women.

A Well, one might consider it somewhat sadistic

to cohabit with a woman and even get in trouble with the law, because of his cohabitation.

Q We are referring to something other than the criminal record.

A This is not the criminal record. This is the marital history.

Q Isn't that true, doctor, that that's the crime he pled guilty to in 1954?

A No.

Q Wasn't it two offences, doctor? Look at the criminal offences. Isn't there two offences he pled guilty to in 1954?

MR. CESTARO: I submit the doctor should be-- he was asked anything in the probation report which would show sadistic attitude towards women. He started to answer and I ask he be permitted to answer.

THE COURT: Let the witness finish answering the question.

WITNESS: There is a suggestion of sadistic tendency to live with a woman. He lived with this woman before he was married and they were both brought up on charges of cohabiting. and then, after

this he left her, and it was the feeling of the persons who made the report that he had an attitude of indifference to this woman.

I might consider that sadistic, although I would say it is not too sadistic. He hasn't beaten her.

Q You didn't find any record of any beating?

A No.

Q Isn't it very possible that that individual, if it was middle-class, might end up in divorce court, in the Supreme Court?

A He was eventually divorced from her.

Q Are you familiar with any degree of the recidivism rate of the people who commit violent rape?

A Yes; it's high.

Q Well, have you ever seen the uniform crime report on this particular figure, doctor?

A No, I haven't.

Q Well, isn't it true that that particular report lists it as one of the lowest recidivism rates out of the 27 crimes listed?

A I didn't see the report, counselor.

Q Have you read or heard about that particular report?

A No, I haven't.

Q Isn't it also true that psychopaths or sociopaths have a tendency as they advance into middle life to decrease their anti-social activity and, to some degree, to integrate their activity, integrate their personality to become more mature?

A Most of them, in the advancing years, are in prison, so they can't continue with their activities.

Q When you say "most of them," you are referring to most you come in contact with.

A The others aren't apprehended, so we don't know.

Q Well, we refer to the anti-social personality. We are referring to a person who doesn't have a sufficiently developed conscience, isn't that true, doctor?

A Some classify it as that. I don't.

Q Would you agree with that classification?

A My belief is that there is a lack of impulse control.

Q What was that?

A I believe there is a lack of impulse control,

they can't control their impulses as well as the average person can, for some unknown reason.

Q Do you rely on any particular text or research that you've done in the area to corroborate your opinion on that?

A Just my reading of many, many texts, articles and working with these people, examining them, talking to them. looking over their past records.

Q Doctor, before we talked about the book by Noyes and Culp, "Modern Clinical Psychiatry."

Now, I am going to read to you a statement in that book and you tell me whether you agree with it or not.

MR. CESTARO: Objection. The doctor said this book is obsolete.

THE COURT: It's the only one he can find.

Go ahead.

Q "The psychopath lacks a conscience. The result, possibly of an emotional deprivation in childhood, which made it impossible to identify himself with a parental figure. Emotional and personality development lags."

Do you agree with that statement?

A Our knowledge has come a bit further since that was written. We have different ideas on that now.

THE COURT: You don't agree with that?

WITNESS: No.

MR. MEYER: No further questions.

MR. CESTARO: If Your Honor please, I would like to have the probation report deemed in evidence at this time.

THE COURT: All right.

MR. MEYER: Objection.

THE COURT: Overruled.

MR. MEYER: Your Honor, can I address myself to that? The doctor made his diagnosis based upon what he testified to, which didn't necessarily include the entire probation report. And I would think that it would be unjustified to have the entire probation report put into evidence, in that it is not part of the doctor's diagnosis.

THE COURT: The probation report, if it is put into evidence, is only available to myself.

It can do no harm. I will permit it.

[Above probation report referred to deemed

People's Exhibit 1 in Evidence.]

REDIRECT EXAMINATION

BY MR. CESTARO:

Q In addition to the anti-social behavior, nature of the defendant, you did find that there was some psychiatric disorder, is that correct?

A Yes.

Q And that was what you referred to as a vague paranoid disorder, is that correct?

A Yes. Vague, paranoid thinking disorder.

Q Based on your medical experience and training, did you form an opinion as to the nature, continuing nature of this disorder?

MR. MEYER: Objection. This is not proper redirect.

MR. CESTARO: He asked questions on it, if Your Honor please.

THE COURT: What is the question?

MR. CESTARO: The question is whether or not the doctor has any opinion concerning the continuing nature of the paranoid condition which he says he found in the defendant.

THE COURT: I will permit that question.

WITNESS: You mean the prognosis?

Q That's it.

A Well, as I mentioned before when I was asked
by Mr. Meyer, the prognosis may not be too unfavorable
with treatment.

Q With treatment.

A With treatment.

Q So that, in your opinion, doctor, this defendant
would need a structured environment in order to protect
society against his paranoid tendencies. Would you say
that?

MR. MEYER: Objection, as leading. The
doctor never testified to that.

THE COURT: I will permit that.

A As I mentioned before, I believe that he should
receive tranquilizers in a closed setting, at first. If
later he adjusts well in a closed setting, he should be
continued on as an out-patient basis.

Q And in your opinion, if he did not receive
that chemotherapy in a closed setting, the prognosis
would be towards a deterioration of the mental condition.

MR. MEYER: Objection.

THE COURT: I will permit it. You are leading the witness, but go ahead.

A The only reason I mentioned a closed setting, Your Honor, because of the past history.

THE COURT: This question was: If he doesn't get this treatment that you have advocated, you think he will become cured any way?

WITNESS: No. I think he needs tranquilizers or some other drug that may be helpful. Various studies would have to be done to determine what drug would best be situated.

MR. CESTARO: No further questions.

THE COURT: Any further questions, Mr. Meyer?

MR. MEYER: No further questions.

THE COURT: All right. Thank you very much.

Now, it's five o'clock. When is your psychiatrist coming?

MR. MEYER: I think he could make it this Friday. If not, Thursday or Friday following this.

THE COURT: How about next Tuesday.

MR. MEYER: The problem with my doctor, he is

only available on Thursday or Friday.

THE COURT: And your doctors are available on Tuesday.

MR. CESTARO: Yes.

THE COURT: I think we are going to have to put this over to next Tuesday. And then, if your doctor is not ready, we will have to continue it to Friday.

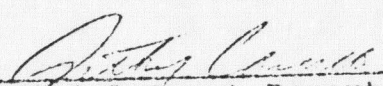
MR. MEYER: Fine.

THE COURT: Give Dr. Sutton my apologies, but we can't go on anymore.

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CERTIFICATION: .

I hereby certify the above minutes to be true and accurate.



Official Court Reporter

COUNTY COURT : NASSAU COUNTY
PART II

-----x

PEOPLE OF THE STATE OF NEW YORK :

-against- :

DAVID HOLLIS, :

Defendant. :

Ind. No. 20287
20656

-----x

Mineola, New York
January 28, 1969

B e f o r e:

HON. PAUL KELLY,

County Court Judge.

A p p e a r a n c e s:

GIRO CESTARO, ESQ.,
Assistant District Attorney,
For the People.

JAMES J. McDONOUGH, ESQ.,
Legal Aid Society,
By: MICHAEL MEYERS, ESQ., of Counsel,
For the Defendant.

- - -
MINUTES OF HEARING ON PSYCHIATRIC REPORT
- - -

THE CLERK: People versus David Hollis, Hearing
on Psychiatric report, under Section 2189A of the
Penal Law. Hearing continued.

MR. CESTARO: Call Dr. Sutton.

MR. MEYERS: Your Honor, before we start the examination of Dr. Sutton, I'd like to renew my objection to the introduction of the probation report in its entirety for the simple reason that not only is it hearsay, but the relevancy of certain portions of that report were not demonstrated, either on direct or cross examination, and I would feel the relevancy is -- -- well, it really is getting the worst type of hearsay into evidence without having the actual people who would testify to this, coming on the stand and so testifying. I just would like to renew that application for Your Honor's consideration.

THE COURT: Well, let the record show that I haven't seen the probation report and I will reserve decision.

MR. MEYERS: Thank you.

H. LAWRENCE SUTTON, 230 Hilton Avenue, Hempstead, New York, being called as a witness for the people, after having been first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. CESTARO:

Q Would you give us your profession?

A Pardon?

Q Give us your profession, sir?

A I'm sorry, I didn't hear you.

Q I will withdraw the question. Are you a doctor, duly licensed to practice medicine in the State of New York?

A I am.

Q And how long have you been so licensed?

A I have been licensed in New York since 1946.

Q Do you have an office where you practice medicine?

A I do.

Q And do you have any specialty?

A My specialty is psychiatry.

Q Now, will you give us your medical background insofar as the educational aspects are concerned?

A I am a graduate of the University of Maryland Medical School, in 1934. I interned at Lenox Hill Hospital in New York City from 1934 until 1936. I had a residency in psychiatry at the Bronx Veteran Administration Hospital for two years. I am a Diplomate of the American Board of Psychiatry and Neurology in Psychiatry. I am a Fellow of the American Psychiatric Association, and I am attending psychiatrist at Meadowbrook Hospital.

Q I see. Now, Doctor -- --

A -- -- And my practice is limited to psychiatry since 1946.

Q All right, and could you describe more fully the experience you have had in the practice of psychiatry?

A With reference to legal work?

Q Legal work and general practice.

A Well, my practice is limited to psychiatry. Office practice mostly. But I have had patients in the hospitals. I have treated all kinds of psychiatric problems, patients with psychiatric problems, and I do a lot of examination of offenders to determine their competency to stand trial.

Q And have you testified in the past with relation to your psychiatric examinations?

A I have.

Q And how often would you say you have testified?

A I would say that I testify about ten times a year.

Q Now, do you recall examining one David Hollis, pursuant to an order of this Court?

A I did.

Q And could you tell us when you examined David Hollis?

A November 14, 1968.

Q Where did you examine him?

A At Meadowbrook Hospital.

Q Was that pursuant to an appointment by Dr. Carlin, Superintendent of Meadowbrook Hospital?

A Yes.

Q All right. Now, will you tell us what your examination consisted of?

A The examination consists of an interview-type of examination. I ask questions in a specific sequence in order to get information as quickly as I can, in order to make a diagnosis. I also deal with the complaint problem, if an offender has one; that is, what bothers him the most, and past history.

Q Now, do you recall any of the questions that you asked and the answers that were made by the Defendant during the course of this interview?

A Not verbatim.

Q In substance?

In substance, we tried to determine whether or not he is capable of understanding -- --

MR. MEYERS: -- -- Objection to the answer.

THE COURT: What grounds?

MR. MEYERS: He is asking him whether he recalls the questions and answers, not whether he is capable of understanding.

MR. CESTARO: Well, his answer was that he didn't remember verbatim, but then I asked him if he remembered in substance and he is telling me that.

THE COURT: Well, you asked what questions were asked, is that right?

MR. CESTARO: That's right.

THE COURT: Now he is answering that.

MR. MEYERS: No, he is not. He was asked whether he recalls the questions and the answers that were given. Now he is going on to what the purpose of the examination was.

THE COURT: Well, tell us what you asked and tell us what he said?

THE WITNESS: Well, he was asked whether he knows where he is, whether or not he knows the charge against him and the purpose of the examination. I previously had introduced -- -- well, this was done jointly with Dr. Peckstein, in this instance, and I asked him whether he knew the date, where he was and what the relationship was that he had to

the examination and to me, what his relationship to me was. I noticed while -- -- that is, I notice while I am asking him and -- -- I should say, I notice while I am examining him and asking these questions, what his mood is, what his emotional reaction is. If he tells me answers that I do not understand, I ask further questions to clarify that.

MR. MEYERS: Move to strike the latter part of the answer.

Q Well, is it your testimony that this is what you did in this case?

A Essentially, yes.

THE COURT: Overruled, go ahead.

Q In addition to the interview, did you examine any reports as part of your examination?

A Yes, sir.

Q And did you obtain a history from the Defendant concerning any particular incident?

A Well, I have the -- -- the report that I have available to me is a probation department report from the Nassau County Adult Division, and in going over it, I asked him questions with reference to charges and statements that are made in the report.

Q Now, based on your questions and the answers you received and based on the examination of any reports that you may have had access to, did you make a diagnosis as to the mental condition of this Defendant, David Hollis?

A I did.

Q And what was that diagnosis?

A That he has a character disorder and an anti-personality type of character disorder, that he is without psychosis.

THE COURT: Now, let me have that again, please?

THE WITNESS: He has a personality disorder.

There is some defect in his personality organization.

THE COURT: Now, what else?

THE WITNESS: That he is not psychotic.

THE COURT: All right.

Q Now, based on your examination, Doctor, and the reports that you examined, can you say with a reasonable degree of certainty whether or not this personality disorder requires a structured environment?

MR. MEYERS: Objection.

THE COURT: Let me have that question again.

(Whereupon, the last question was read back by the reporter.)

THE COURT: Yes, I will sustain that objection.

Q In your opinion, doctor, can you give us a prognosis of the personality disorder which you are referring to?

MR. MEYERS: Objection.

THE COURT: No, I will permit that.

A ~~X~~ Well, the prognosis, though guarded, is one that is -- -- well, it's impossible to predict his behavior, outside of a structured environment.

Q And in your opinion, Doctor, based on your medical experience and your examination of this man, can this personality disorder be treated?

A He can be treated, but the results are doubtful.

Q And in your opinion, Doctor, would you say that the treatment requires a structured environment?

MR. MEYERS: Objection.

THE COURT: No, I wish you wouldn't use "structured environment." You could say, for instance, does the Doctor feel that this man should be hospitalized, but it is not up to the Doctor to say whether he should be put in prison or not.

MR. CESTARO: I will accept your Honor's suggestion.

Q Would you feel then, in your opinion, Doctor, that because of this personality disorder, that this Defendant should be hospitalized or kept under some sort of supervision?

A ~~X~~ He should be kept under supervision, but not necessarily in a hospital.

Q And that supervision would be for purposes of treatment, is that correct?

A For purposes of treatment and also to help him maintain his ability to function outside of a hospital. ~~X~~

Q And can you give us any opinion as to how long such a requirement would be necessary?

MR. MEYERS: Objection.

Q That is, a requirement that he be hospitalized?

MR. MEYERS: Objection.

THE COURT: No, I will permit that.

A There is no way of determining that excepting by his behavior in the institution that he is hospitalized in and the reports of the doctors that have seen him there.

MR. CESTARO: No further questions.

MR. MEYERS: Before I proceed, may I have the last question and answer repeated?

(Whereupon, the testimony was read back by the

reporter.)

CROSS EXAMINATION BY MR. MEYERS:

Q Doctor, there is no doubt in your conclusion, is there, Doctor, that you feel that he is amenable to treatment?

A He is, yes.

Q And you don't know, I mean, you couldn't, you wouldn't know how long the treatment would take, do you, Doctor?

A No, I do know.

Q Just answer yes or no. Would you know how long it would take? I don't want any guesses.

A I am not guessing at anything.

MR. CESTARO: Objection, Your Honor. I object.

Q Answer the question.

A You asked me a qualified question. I think I should be allowed to answer that in a qualified way.

Q Please answer my question.

A He has the type of disorder that we have the treatment -- --

Q -- -- No, please answer my question.

MR. CESTARO: Your Honor, the witness is attempting to answer the question.

MR. MEYERS: But he is not being responsive.

I would like an answer to my question.

THE COURT: See if you can answer it. If you can't, you can't.

THE WITNESS: Please, may I have the question asked again?

Q Doctor, could you tell me with any degree of certainty how long it would take an individual like this to be cured?

THE COURT: Now, that question, that question can be answered "Yes, I can tell you," or "No, I can't tell you."

A No, I can't tell you.

Q Could you tell me, Doctor, in certain instances, it is true, is it not, that if an individual like this would take -- -- an individual like this would take a very long time to be cured, could we say that?

A Well -- --

Q In certain instances, that's true, isn't it?

A Treatment of this kind of an illness takes a long time to be treated.

Q And sometimes an individual like this, conversely, is cured in a very short time, isn't that true, Doctor?

Sometimes? I am not saying this in this particular case, but in general?

A In my experience, no.

Q In any event, Doctor, your examination of the Defendant is based upon, first of all, a reading or a perusal of the probation report, isn't that correct?

A That is the past history, yes.

Q By the way, how long did the examination take?

A Well, the examinations like this usually take a half hour. I think in this instance it took longer because of the long record that we had to review. I would say 40 minutes.

Q Well, during that 40-minute period, part of the time was spent in reading the 17-page probation report, is that correct?

A No, the probation report was read before he came in, while he was there, and after he left.

Q I see. In any event, what you are saying is that you talked to him for a period of 40 minutes, Doctor?

A Approximately.

Q And one of the questions you asked him was did he know where he is?

A Yes.

Q And he replied in a satisfactory manner to that question, did he not, Doctor?

A Yes.

Q You also asked him did he know what date it was?

A Yes.

Q He had no problem responding to that particular question, did he?

A No, no.

Q In other words, Doctor, we can say that his orientation with respect to who he is, where he is and what he was there for was satisfactory?

A Right.

Q Now, aside from those preliminary questions, Doctor, do you remember asking him anything else?

A Yes, I asked him if he recalled the alleged offense.

Q And by the alleged offense, we are talking about the plea to assault with the intent to commit rape, right?

A Right.

MR. CESTARO: I object to that, if Your Honor please. He is talking about a Plea. The Doctor is talking about an alleged offense.

MR. MEYERS: Well, you want me to rephrase it, I will rephrase it.

THE COURT: All right, rephrase it.

Q Doctor, when you refer to an offense, what are you talking about, do you know? Do you know what you are referring to?

A An offense?

Q Yes. Which particular offense are you referring to?

A The instant offense.

Q Well, would it refresh your recollection, Doctor, if I said to you that the instant offense is a plea to assault, two, with the intent to commit rape?

MR. CESTARO: Objection, Judge. Object to the form of that. The instant offense is a plea. We are talking about an incident and he is talking about a plea, Judge.

THE COURT: Do you understand what the attorney is asking? What the attorney is asking is, does the Doctor know or did the doctor know when he was asking him, did he know what he had been charged with and what he had pleaded guilty to. Is that right?

MR. MEYERS: Right.

THE COURT: All right, did you know?

THE WITNESS: Yes.

THE COURT: What?

THE WITNESS: Yes.

THE COURT: All right, he did.

Q All right, and isn't it correct that it was an assault, two, with the intent to rape? Is that the charge?

A Well, I would have to look at this record to determine that. If that is what you have in the record, then I -- --

Q -- -- Well, why don't you refresh your recollection? It's probably in the first few pages, where it lists his record.

A You want me to read what I have on this page?

Q No, Doctor, I want your testimony as to what the charge was at that particular time, that you thought he had plead to.

A The charge was -- -- Let me see -- --

Q You can refresh your recollection with your notes.

MR. CESTARO: Judge, again, I object to the whole form of this question, because he is confusing pleas

with the charge, and he is also confusing the plea with the actual incident itself. He is asking this Doctor, number one, as to what the charge was, and then he refers to a plea of assault in the second degree, with intent to rape.

THE COURT: What is your question?

Q You questioned him about a certain offense, did you not?

THE COURT: Just a moment, what is the question you are asking the Doctor?

Q What was the offense that you questioned him about? What was the underlying offense as far as you are concerned, Doctor?

A Attempted rape.

Q And did you yourself at that time know what the attempted rape consisted of?

A Yes.

Q And you then asked him certain questions about that, is that correct, Doctor?

A I asked him questions about what he answered in describing what had happened.

Q Do you remember his answers? Do you remember the questions you asked him?

A Not verbatim, no.

Q Well, in sum and substance.

A The purpose of my examination -- --

Q -- -- No, Doctor, just answer the question. Not what the purpose of your examination was. Do you remember the sum and substance of the questions you asked him with respect to the alleged offense?

A Well, the alleged offense did not interest me. The content of his thought did.

Q Doctor, this question can be answered in a yes or no form.

THE COURT: If you remember the sum and substance?

A I don't remember the questions that I asked him and I don't remember his answers verbatim.

Q Well, can you give me the sum and substance of his answers to your questions relating to an offense?

A The sum and substance of his answers indicated to me that he knew -- --

Q -- -- Doctor, please -- --

A -- -- What was going on.

Q Doctor, I am asking what his reply now was, not what they indicated to you, but what the reply to your questions were.

A I don't recall that.

Q So, in other words, Doctors, the only thing you do recall here is that he knew where he was, he knew what he was charged with and he knew the date on which you were examining in? That you do recall him answering, don't you, Doctor?

A I do.

Q All right. Now, by the way, Doctor, this examination you said took place on November 14th?

A Yes, sir.

Q And the report that you submitted to the Court is dated November 18, 1968. Do you have any notes that you took on November 14th?

A I don't carry notes. I examine and then I dictate and then the stenographer types it and then I review the rough copy, and then a report, such as addressed to Judge Kelly, in this instance, dated November 18th, four days later, is made.

Q Well, in this instance, what you are saying, as soon as the examination is over, you then dictate to your secretary with respect to your findings?

A No, I dictate to a recording machine.

Q That's immediately?

A Yes.

Q Right after that?

A Yes.

Q All right. With respect to the contents of the probation report, isn't it true, Doctor, that that includes a period of time consisting of early childhood, up until 1965?

A Yes.

Q Is that correct, doctor?

A Yes. Not early childhood. I believe 19 -- --

Q -- -- 48?

A 48.

Q 1948 until 1965, is that correct?

A Yes.

Q You do not know, Doctor, anything about his early childhood, do you?

A From the history there is a history of his earlier -- -- that is the police record from 1948.

Q Let me ask you, did you speak to the man's mother and father or anybody in his family, with respect to the individual.

A The report includes description of a conversation that was had with his mother and father and the rest of

his family.

Q Could you let me see that report for a second, Doctor?

A The area that we are talking about?

Q Yes. Please, I will find it.

A That's all right, I have it right here (indicating). It's the bottom of the page (indicating).

Q Doctor, when you made your diagnosis, you, of course, took into consideration his relationship with people like his parents, did you not, Doctor?

A Yes.

Q And you did note at that particular time, didn't you, Doctor, that the family enjoyed a fairly good reputation in the community in Georgia, is that correct?

A The family did.

Q And as far as you could determine, with respect to the family as a whole, the family was always intact and that the parents enjoyed a happy relationship until their death, is that correct, Doctor?

A If that is what you are reading there, that's exactly right.

Q All right. So as far as we could say, there was nothing in the Defendant's -- --

